No. 08-1421

In the Supreme Court of the United States

BURR E. LEE, JR. AND RUTH C. LEE SELF-DECLARATION OF TRUST NO. 10331J, RICHARD A. VAN AUKEN, TRUSTEE,

PETITIONER

v.

CATRON, CATRON & POTTOW, P.A., FLETCHER R. CATRON, ESQ., AND KAREN AUBREY, ESQ.,

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

PETITION FOR REHEARING

RICHARD A. VAN AUKEN, TRUSTEE
pro se

223 North Guadalupe Street, #524
Santa Fe, New Mexico 87501
917/216-0523

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

Table of Authorities ii

Statement 1

Argument 2

I. Lacking Certiorari, Legal Rights of Trustee Are Preempted by Equity Rights of Attorneys 2

II. Artifical Legal Entities are Used to Shield Wrongful Acts by Real Persons 5

III. Equity and Judicial Integrity Depend on Affirmation of Law by Those Empowered To Do So 7

Conclusion 10

TABLE OF AUTHORITIES

Cases:

Lee v. Catron, 2009-NMCA-018 ..... 2, 6, 8, 9
145 N.M. 573, 203 P.3d 104 (2009)

Martinez v. Roscoe, 2001-NMCA-083 6
131 N.M. 137, 33 P.3d 887 (2001)

New Mexico Rules of Civil Procedure:

Rules for District Courts:

NMRA Rule 1-019, Joinder of persons 4
needed for just adjudication

U.S. Constitution:

Article VI 8

Amendment V 1, 5

Amendment XIV 1, 5

Miscellaneous:

Bar Bulletin, State Bar of New Mexico (10/5/09)..... 4

Equity & Trusts, Alastair Hudson (2005 ed.) 10

Loring: A Trustee's Handbook (2006 ed.) 10

PETITION FOR REHEARING

Pursuant to Rule 44.2, Petitioner respectfully petitions this Court for rehearing. References are made herein to the Body and Appendices of the original *Petition*.

STATEMENT

The original *Petition for Writ of Certiorari*, filed May 14, 2009, sought review of an *ad hoc* state court opinion for the purpose of establishing trustee's right in state courts to personally conduct his own cases involving trust property and argued that the opinion created *conflicted law* and was part of a pattern which *infringed upon Constitutional rights* of the trustee to due process and equal protection in claims against attorneys.

This *Petition for Rehearing* is based on substantial effects which immediately followed this Court's denial of *certiorari* on October 5, 2009 and on two controlling issues not previously presented: (i) the manipulation of artificial legal entities to the detriment of a real person and (ii) the toxic effects on equity when laws are not affirmed and enforced.

The original *Petition for Writ of Certiorari* details how an evident breach of trust was aided, abetted and covered-up by Respondent-attorneys with great injury to Petitioner-trustee and trust beneficiaries. Infringement of trustee's rights is set forth through eighteen separate acts in this Case and in three earlier related cases since 2002, nine acts obstructing trustee's right to judicial determination of trust instrument language and nine acts of intimidation of the bar denying trustee access to New Mexico courts.

This *Petition for Rehearing* presents how Respondents, unrestrained by law protecting Petitioner's right to construction and to court access, now apply for complete dismissal of claims against them on the basis of ***fairness***:

"equity and good conscience," Respondents argue, dictate dismissal because failure to join the trustee unfairly subjects them to multiple, inconsistent obligations. There being no authority at law for holding them to account for their well-documented acts, equity can dismiss.

This *Petition for Rehearing* also demonstrates, from the facts in this Case, how artificial legal "entities" such as corporations, LLCs and business trusts push aside individual (real) persons in addressing higher priority needs of the "entities" and in shielding other (real) persons from accountability for their acts. The facts succinctly show how a simple assertion that an artificial legal "entity" exists provided protection to (real) persons even after the assertion was proven, in a first impression opinion, to be false.

Finally, this *Petition for Rehearing* demonstrates, from the facts in this Case, that general respect for routine equity judgments and judicial willingness to make such judgments can begin to unravel if established laws and Constitutional rights are not separately affirmed and enforced by those empowered to do so.

Petitioner believes that this Court should rehear the request to provide such affirmation and enforcement and respectfully asks this Court to proceed with this *Petition for Rehearing* at least to the extent of requiring Respondents to file responses to Petitioner's argument herein.

ARGUMENT

I. LACKING CERTIORARI, LEGAL RIGHTS OF TRUSTEE ARE PREEMPTED BY EQUITY RIGHTS OF DEFENDING ATTORNEYS

The Order of this Court denying *certiorari* was issued on Monday, October 5, 2009 meaning that the opinion in *Lee v. Catron*, 2009-NMCA-018 was upheld for this and

earlier related cases. The dismissal of claims entered *pro se* by an individual family trustee is effective.

That very same day, October 5, 2009, the Catron Respondants served a motion to dismiss all still-pending claims of the beneficiary in the prior related case, *Van Auken v. Catron et al.* (2006), filed *pro se* by the Petitioner both as trustee and as a beneficiary named in the underlying trust instrument. By October 13, 2009 Respondent Aubrey had joined in this dismissal motion.

The primary reason given justifying dismissal of beneficiary claims is the lack of joinder of the trustee whose legal ownership of property in the trust estate, apparently, is a pre-condition for actionable equity interests of the beneficiary. The dismissal motion quotes the appellate court review in this earlier case:

> Plaintiff on behalf of the Trust, which is not a party, is seeking to recover an asset for the Trust so that it can be distributed to himself as beneficiary. As such, the claims of the Plaintiff individually cannot proceed without Plaintiff as Trustee recovering the Trust asset sought to be distributed to Plaintiff as individual beneficiary.

New Mexico Court of Appeals, *Memorandum Opinion* dated June 27, 2008 in *Van Auken v. Catron et al.* (2006) [See Pet. App. 13a, last two sentences on page]

The "Trust" is not a party because the *pro se* trustee has been denied access to New Mexico courts. The failure of the *Petition for Writ of Certiorari* sustained this denial of access.

So now as a direct result, in this earlier related case, Respondents are seeking dismissal of the beneficiary's claims for non-joinder of the *pro se* trustee based on a procedural rule invoking "equity:"

> B. Determination by court whenever joinder not feasible. If a person as described in . . . this rule cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable.

NMRA Rule 1-019. Joinder of persons needed for just adjudication

Since resolution of the claims at law have been blocked, Respondents appeal to the equity jurisdiction of the district court in requesting dismissal. Dismissal is fair, the pleading says, because otherwise Respondents would be "subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations."

Petitioner is aware that the appellate jurisdiction of this Court does not extend to equity matters but that is exactly the point. The *equity interests* of the trust beneficiaries are being trampled by *equity rights* of the defending attorneys (Respondents) because, and only because, ***laws*** creating and protecting the *legal rights* of the trustee - ***laws which "equity is bound to follow"*** - were at first compromised by specious assertions that express trusts are artificial legal entities and were then abandoned, apparently, by those empowered to enforce them.

Also on October 5, 2009, another not-unrelated scheduled event was reported as follows:

> **Judicial Vacancy:** A vacancy on the 1st Judicial District Court will exist in Santa Fe as of Jan. 1, 2010, upon the retirement of the Honorable James A. Hall. Chief Judge Stephen Pfeffer has indicated that initially this division will be assigned to Juvenile, Domestic Relations as well as the Abuse and Neglect docket.

NM Bar Bulletin, October 5, 2009, vol. 48, No. 40, p.6

This departure of the highly competent district court judge presiding over this and related cases brings into focus the great difficulty faced by both litigants and the judicial system when the law lacks clarity and equity is demanded.

Petitioner respectfully asks this Court to rehear the request for *certiorari* in order to provide such clarity in law. At a minimum, this Court should seek Respondents' argument on why their equity rights ought to preempt the legal rights of the trustee.

II. ARTIFICIAL LEGAL ENTITIES ARE USED TO SHIELD WRONGFUL ACTS BY REAL PERSONS

Considerable media attention has been generated recently by the issue of "corporate personhood" where an artificial legal construct, the corporation, is given rights normally associated with an individual natural (real) person. One area affected is campaign finance law where rights of individual citizens are being claimed by multi-state - even international - corporate "entities."

This *Petition for Rehearing* raises this substantial issue of the artificial legal "entity" as it has been asserted for common law trusts, not corporations, and where, rather than national elections, the facts relate to one family's property and to a relatively small dollar amount in claims.

Petitioner, however, notes that many of the same questions pertain and Constitutional protections for an individual (real) person, the trustee, are similarly challenged in this Case as for those (real) persons covered in the media. Consider, for instance, the two protections argued in the original *Petition:*

Whether one (real) person's right to ***due process*** is infringed by another (real) person who exercises additional powers through an artificial "entity;" and

Whether one (real) person is denied ***equal protection*** of the law as a consequence of another (real) person's ability

to manipulate one or more artificial "entities" to his or her legal advantage.

The facts in this Case present, on a small simple stage ready for review, "real-person" relationships alongside legal conflicts resulting from use of an artificial "entity."

This Case demonstrates the unfair and even un-Constitutional advantage held by those (real) persons who are able to create and manipulate a legal "entity" in disputes with those (real) persons who are not so able. The law and the legal community appear to be improperly swayed by the "entity" manipulators.

As trustee in *Van Auken v. Catron et al.* (2006), Petitioner attempted to do his duty under the trust instrument and get its language constructed by a court of competent jurisdiction. Opposing this dutiful request for their own defensive reasons, Respondents were able to assert that the trustee was really representing an "artificial entity" - the Trust - which "entity," they further asserted, required licensed counsel to even appear in court. Relevant New Mexico case law, *Martinez v. Roscoe*, 2001-NMCA-083, was repeatedly cited and repeatedly used to dismiss claims in *Van Auken v. Catron et al.* (2006) and, subsequently, in *Lee v. Catron et al.* (2007). This "entity" defense was rejected on appeal by *Lee v. Catron*, 2009-NMCA-018, but it did not matter. Dismissals were sustained on other *ad hoc* grounds. The "entity" assertion bought the Respondents two years and Petitioner now must address the effects of new *ad hoc* case law.

Another aspect of the artificial "entity" issue demonstrated by the facts in this case is the way an artificial "entity" can cloak and protect a group of several (real) persons. In a dispute involving an "entity," a (real) person appears not to be able to engage other (real) persons directly. The dispute becomes focused on the interests and rights of the "entity" not those of the group.

How is an individual (real) person supposed to engage such an "entity-cloaked" group on equal terms?

The facts in this Case show that, lacking *certiorari* by this Court, the (real) persons who acted to aid, abet and cover-up a serious breach of trust will be able to continue to avoid accountability to another (real) person whose personal legal title to property in the trust estate was given away in the breach. The facts show that the wrong-doers have been advantaged by their ability to professionally assert that an express trust is an "entity."

As part of this *Petition for Rehearing*, Petitioner has executed a letter certifying that the application for further review is made in good faith and not for reasons of delay.

In requiring response to this *Petition* this Court might seek to determine whether or not Respondents used the now-discredited assertion that a family trust is an artificial "entity" in good faith and not for reasons of delay.

Should this Court ultimately grant *certiorari* and review this Case, Petitioner believes the Court will discover many fundamental effects which attach to the use of artificial legal "entities" some which, as documented in the original *Petition*, clearly violate Constitutional rights of (real) persons.

III. EQUITY AND JUDICIAL INTEGRITY DEPEND ON AFFIRMATION OF LAW BY THOSE EMPOWERED TO DO SO

The second substantial issue presented in this *Petition for Rehearing* is that equity depends on certain solid foundations in established law - foundations which were removed or ignored in this Case. Like many other cases this Case involves both law and equity but the foundations for both lie in law and this Case demonstrates that established law must be enforced or equity and fairness have no meaning or effect.

Particularly damaging to equity or fairness is the instance, evident in *Lee v. Catron*, 2009-NMCA-018, where the law is changed in the middle of an important proceeding. This is like suddenly calling a batter out after two strikes in the middle of a big game. Maybe the rule change is justified but the indelible impression is left that it was an *ad hoc* decision to unfairly disadvantage one side in the contest and to unfairly benefit the other.

The baseball analogy can be extended to the viability of the game itself for if rules are regularly changed on an *ad hoc* basis by those seeking to disadvantage one side or another, very few would participate in the sport because of the impossibility of fair competition on the field. Competition then shifts to the rules themselves. The lack of consistent enforcement of basic rules removes fair competition and destroys the sport.

So it is with enforcement of the basic protections of the Constitution which each of the members of this Court has sworn to "support" under Article VI of that document.

Lack of enforcement of basic rules and protections is toxic to participating members of the judiciary who, when laws provide no resolution to claims and defenses, are forced to make difficult or impossible equitable rulings. This may explain this retirement of a good judge in Santa Fe who may have valued instruction on the law from this Court more than the Petitioner.

Respondents' recent effort to get a difficult dismissal on equitable grounds only highlights this toxic effect. Wrongdoers who are allowed to trample the rules drive out those who follow those rules. Respondents' firm obstruction of trustee's proper attempts to enforce the family trust appear to have driven out two judges and four attorneys. [Pet. Bod. 16, 17; ¶¶ 2.1 - 2.5]

Equity is under attack in this Case. It is under attack because licensed attorneys have been caught using their

knowledge of and access to equity proceedings of the district court (i) to take family property in breach of the terms of a written trust instrument and (ii) to cover up this breach during probate.

Now if these attorneys had gone no further than the breach and the probate cover-up, then there would be no petitioning of this Court, for this Court's appellate jurisdiction is in law and facts, not equity.

However, the attorneys *did* go further. They moved for, and ultimately received, protection from New Mexico Courts by making specious assertions that the trust was an "entity" which required the *pro se* trustee to obtain licensed representation where such counsel was either very hard to retain or, when it was arranged, later withdrew. This "entity" defense worked, up to the time it didn't in the appellate review of this Case when the attorneys received different protection from new case law, *Lee v. Catron*, 2009-NMCA-018.

Its rejection of the "entity" defense notwithstanding, *Lee v. Catron*, 2009-NMCA-018 is conflicted, *ad hoc* case law. Something of a bonanza for trust and estate attorneys, it is a nightmare for nonattorney fiduciaries such as family trustees. Equity proceedings by individual fiduciaries have been dealt a body blow by the ruling.

However, *Lee v. Catron*, 2009-NMCA-018 is new ***law*** and, for that reason, its review is entirely within the appellate jurisdiction of this Court. Petitioner offers this Court the opportunity to reverse the damage of *Lee v. Catron*, 2009-NMCA-018 in New Mexico and to shutdown additional mischief with equity practice in New Mexico and elsewhere. If fiduciaries need attorneys in New Mexico, why not in New York? If a trustee of a trust is required to act through an attorney, why not require that beneficiaries of a trust also act through attorneys?

Lee v. Catron, 2009-NMCA-018 is conflicted ***first impression*** case law which needs to be corrected before more bad case law results. Review by this Court of grounds provided in the original *Petition* can lead to proper corrective and preventive action. The review is at law but the beneficial effects are all in equity.

Equity authorities Loring and Hudson each make this link between existing law and equity:

> Equity follows the law - but not slavishly or always. . . . .[E]quity will be bound to follow statutes in all circumstances. Given the history of equity as a counterpoint to common law, it will not typically refuse to be bound by rules of common law unless there is some unconscionability in applying a particular common law rule.

Equity & Trusts, pp. 25, 26, ¶1.4.2

Should this Court ultimately grant *certiorari* in this Case, Petitioner believes that the Court will address corrective and preventative measures at ***law*** of substantial and lasting benefit to ***equity*** in all states.

CONCLUSION

For nearly two years, the Respondents, all licensed attorneys, and their defense counsel, also attorneys, have sat back exerting minimum effort while Petitioner, a nonattorney trustee attempting to enforce the terms of his family trust, has struggled through multiple appeals in three different courts.

According to Respondents, Petitioner's claims are without merit, terms of his family trust irrelevant, and his lack of standing in New Mexico courts clearly established.

Maybe Respondents will prevail in their quiet defense. However, this Court should not automatically grant Respondents this luxury. The facts clearly demonstrate

something is wrong. How, for example, can a valid family trust instrument remain unconstructed after repeated attempts - with and without counsel - over seven years? How does *ad hoc* case law get established sustaining dismissal effects of a discredited "entity" defense? Or, to plumb the rich minutia of facts available for review, how is it that an attorney committed to pursuing trustee's claims is allowed to withdraw from his representative duties [Pet. Ap. 26a] immediately ***after*** filing a *Notice to Withdraw Motion Allowing Withdrawal of Counsel* [Pet. Ap. 66a]? These questions, big and small, demand some response.

This Court should proceed with this *Petition for Rehearing* at least to the extent of requiring Respondents to file a response to Petitioner's argument herein. As argued above such decision to proceed will benefit a great many others beyond Petitioner and the beneficiaries named in his family trust.

Respectfully submitted

Richard A. Van Auken
Trustee, *pro se*

223 North Guadalupe Street, #524
Santa Fe, New Mexico 87501
917/216-0523